IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs November 27, 2007

STATE OF TENNESSEE v. LONNIE T. LAWRENCE AND PATRICK D. PICKETT

Interlocutory Appeal from the Circuit Court for Blount County
Nos. C-15261, C-15257, C-15258 D. Kelly Thomas, Jr., Judge

No. E2007-00114-CCA-R9-CD - Filed March 17, 2008

The appellant, the State of Tennessee, charged the appellees, Lonnie T. Lawrence and Patrick D. Pickett,[1] with manufacturing methamphetamine, possession of methamphetamine, and vandalism. In this interlocutory appeal, the State argues that the trial court erroneously suppressed eighteen photographs of evidence discovered at the crime scene, an alleged methamphetamine laboratory. Upon review of the record and the parties' briefs, we affirm the trial court's order in part, reverse in part, and remand the case for trial.

Tenn. R. App. P. 9 Interlocutory Appeal; Order of the Circuit Court is Affirmed in Part and Reversed in Part, Case Remanded.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which, ALAN E. GLENN and ROBERT W. WEDEMEYER, JJ., joined.

Robert E. Cooper, Jr., Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; Michael L. Flynn, District Attorney General; and Michael A. Gallegos, Assistant District Attorney General, for the appellant, State of Tennessee.

Michael H. Meares (at trial), Maryville, Tennessee, and Kristi M. Davis (on appeal), Knoxville, Tennessee, for the appellee, Lonnie T. Lawrence.

William W. Reedy (at trial), Cleveland, Tennessee, and Damon Wooten (on appeal), Maryville, Tennessee, for the appellee, Patrick D. Pickett.

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[1] A third defendant, Starlit K. Johnson, did not join in the motions to exclude and suppress before the trial court nor in the interlocutory appeal. Also, she filed a notice with this court of her intention not to file a brief in the present appeal, and she subsequently sent a letter to the court expressing her desire to be dropped from this appeal.

OPINION

I. Factual Background

At a hearing on Pickett's Motion to Suppress,[2] Freda Gail Johnson testified that in the summer of 2003, she rented a house at 319 Old Cades Cove Road, Townsend, Tennessee, to Pickett and Starlit Johnson, who told her that they were a married couple, Mr. and Mrs. Bearfield. At the time, she informed the couple that they were not renting a padlocked shed, which stood about one hundred feet from the house and which contained her belongings. On October 4, 2003, she went to the house because the rent was not current. While she was at the property, the police arrived, and she identified Starlit Johnson to Officer Jerry Orr as the woman to whom she had rented the house.

On cross-examination, Freda Johnson testified that on Friday, October 4, she and her husband went to their rental house to perform maintenance and to leave an eviction notice with the tenants. While there, she noticed an extension cord running from the house to the shed. The tenants did not have keys to the shed, but she saw that someone had put an additional padlock on it and that the screws were out of her padlock. She gave the police permission to search her shed. She admitted that initially, she was not sure that Starlit Johnson was the woman to whom she had rented the house because Johnson had changed her hair.

Robert Neese of the Blount County Sheriff's Office testified that he worked on the Fifth Judicial Drug Task Force. On October 4, 2003, he responded to a call concerning a suspected methamphetamine laboratory at 319 Old Cades Cove Road, in Townsend. After observing the contents of the shed, he knocked on the door of the house. After a period of time, he heard movement inside the house. He knocked again and yelled for someone to come to the door. Starlit Johnson opened the door. He asked her if this was her house, and she replied that it was not but that she was renting it. He told her that he suspected the house contained a methamphetamine laboratory, and she denied knowledge of it. He asked if he could come inside and look around to confirm that there was no methamphetamine laboratory. She agreed and invited him inside. He later had her memorialize her oral consent by signing a form entitled Previous Consent to Search.

On cross-examination, Officer Neese testified that upon his arrival, he spoke with the patrol officers who had initially responded to the scene pursuant to a call by the landlord. After Officer Jerry Orr arrived, he and Orr accompanied the other officers to the shed on the property. The door of the shed was unlocked, and the officers pushed it opened and looked inside. He saw items he believed were evidence of a methamphetamine laboratory, but they did not enter the shed at that time. He then went to the house, and Johnson eventually answered the door. After Johnson gave

[2]The main thrust of this September 9, 2005 hearing was to determine whether Johnson had authority to consent to a warrantless search of the rental property in question. The testimony from this hearing is included because this court must evaluate the suppression of the photographs in question in light of the entire record. See State v. Ferguson, 2 S.W.3d 912, 917 (Tenn. 1999).

him verbal consent to enter, he heard movement inside the house and decided to enter immediately for officer safety. Officer Orr, who is familiar with methamphetamine laboratories, conducted a security sweep to check for hazardous materials. After they searched the house, Johnson told him that she had not been there in a couple of weeks and that she was not living there. Officers found two other people in the house, Lawrence and John Maynard.[3] Maynard subsequently entered a guilty plea in this case. On redirect examination, Officer Neese testified that at the time he arrived, the landlady had already shown the shed to the patrol officers.

Jerry Orr of the Blount County Sheriff's Office testified that he was assigned to be a task force officer with the Drug Enforcement Administration (DEA) in Knoxville. On October 4, 2003, he was standing a distance from the house with the landlady when Officer Neese knocked on the door of the house. He saw Johnson open the door, and he asked the landlady if she was a tenant. The landlady was not certain at first, but after changing positions to get a closer look at Johnson, the landlady identified her as the woman who had rented the house and said she had changed her hair.

On cross-examination, Officer Orr testified that after obtaining verbal consent from Johnson, he searched the house. The house contained two other occupants, James Maynard and Lawrence, whom Johnson called "Papaw." He asked Johnson where Pickett was, and she told him that Pickett left at 4:00 a.m. to drive a truck to Kentucky. At the conclusion of the investigation at the house, Johnson was released and told that the District Attorney would decide whether to charge her. He agreed he told Johnson that it was "her responsibility to make sure that [the house] was cleaned up." Maynard was taken into custody to be interviewed, and Lawrence was arrested on an outstanding warrant.

Starlit Kaye Johnson testified that she had been Pickett's girlfriend for over ten years. At the end of July 2003, Pickett rented a house in Townsend, Tennessee. When they had lived there for two or three weeks, she, Pickett, and Lawrence, whom she knew as "Papaw," were working in the yard. Lawrence was trying to repair one of the landlord's chainsaws from the shed. She was worried that the landlord would be upset about this, but the landlord stopped by and told Pickett and Lawrence they could use the equipment in the shed. He also told Picket that he could put a padlock on the shed. Pickett later padlocked the shed, but only Pickett and Lawrence had keys to it.

A couple of weeks before October 4, 2003, she and Pickett "had words," and she returned to her home in Sweetwater, Tennessee. Following their breakup, Pickett called her on a Monday and told her that he would be out of state that week. One evening later that week, she went to the rental house to retrieve a tote bag and a few hanging clothes that she kept there. When she arrived, Lawrence, who stayed there a lot, and another man, whom she knew only as "Cowboy" and whom she later learned was Maynard, were there. The house was "upside down," and she began cleaning it with Lawrence's help. Maynard was in the kitchen and began carrying out what she thought were

[3]While Officer Neese refers to this individual as John Maynard, both Officer Orr and Starlit Johnson refer to him as James or Jamie Maynard. Maynard's booking sheet, which is an exhibit to a hearing on December 19, 2005, reveals that his name is James Maynard.

car parts. She believed that Maynard did not want her to know that they had been working on car parts in the house. Johnson took some sinus medicine for a sinus infection and began to feel nauseous and overheated so she decided to spend the night there.

Johnson testified that the next morning, she showered, gathered her things, and backed her car down to the patio to load it. She reentered the house and, from the kitchen window, saw police officers coming out of the shed. When the officers knocked on the door, Maynard told her not to open it because he and Pickett had outstanding warrants. The officers beat on the door again, and she opened it. The officers told her to raise her hands and step outside. When asked if anyone else was inside, she told them there were two other people there. The officers asked her what was in the shed, but she told them that she had not been to the property in two weeks, that she had only returned to the house to get her belongings, and that she did not live there. She told the officers that Pickett had been out of town that week. At the officers' request, she signed a consent form. Afterward, police officers entered the house with "suits and things," while she remained outside. After the search, Officer Orr said she would be allowed to leave on three conditions: That she cleaned the house and got everything out by the following Friday, that she made sure Pickett called him by Friday, and that she never returned to Blount County.

On cross-examination, Johnson testified that she and Pickett met with the landlord and his wife at the house after Pickett had already spoken to them about renting it. Pickett was the one who gave them information that evening, but she knew Pickett had given them a false name. She said that on October 4, 2003, she told the officers that they could search the house because she had been at that meeting with the landlord and felt "responsible."

At a hearing on Lawrence's Motion to Exclude Photographs, Officer Orr was again called to testify. He testified that Lawrence was arrested at 319 Old Cades Cove Road on October 4, 2003. Officers searched Lawrence's person and found a small plastic bag containing a substance later determined to be methamphetamine in his pocket. They also found a plastic baggy containing a white powder residue in his wallet. In the room that Lawrence was occupying, the officers found coffee filters, plastic gloves, a respirator mask in a cooler, and pseudoephedrine pills. Orr collected eleven items of evidence from the house. A search inventory sheet listed these items as being the two plastic baggies taken from Lawrence's pocket and wallet; three weapons, one being a rifle from Lawrence's bedroom; five samples of unknown liquids, one of which was collected from Lawrence's bedroom; and a homemade brass ignitor. Orr also took thirty-seven photographs depicting the items he collected as well as numerous items in the house and shed that were not collected. Following the search of the property, the remaining items believed to be methamphetamine precursors and bi-products were turned over to Ferguson-Harber, a company that disposes of hazardous materials. Three items collected from the house–a handgun, a brass ignitor, and a small clear baggy–were later tested for fingerprints at Lawrence's request, but they bore no latent prints.

Orr testified that he did not attempt to obtain fingerprints from the clear glass jars from which he collected the samples of unknown liquid because of a departmental policy prohibiting the storage of toxic or hazardous evidence in the evidence vault. He said that other items depicted in the

photographs, such as the pseudoephedrine packages, denatured alcohol, and cans of starter fluid, probably could have been tested for fingerprints at the site. These items would not have been taken to the evidence vault because of their presence in a methamphetamine laboratory. According to Orr, a "cook" in a methamphetamine laboratory would produce "toxic fumes that could be potentially hazardous to anybody that touches" items found there.

Orr testified that he was not an expert in hazardous materials. When he entered the building on the day of the search, he wore a protective suit and a gas mask. Orr identified photograph A[4] as showing cans of denatured alcohol, which he characterized as a methamphetamine precursor. He acknowledged that he was not wearing gloves in the picture but explained that he had been at the site for several hours at that point and that the house had been secured and "vented . . . out." He agreed that the cans of denatured alcohol in the photograph could have been collected and tested for fingerprints. Orr identified his bare hand and face in photograph B,[5] which reveals Orr holding a mask inside the house. This mask was found in the closet of the bedroom where Lawrence was staying. Orr agreed that the items that he held with his bare hands could have been made available for fingerprint analysis.

Regarding photograph C, which depicted a cooler containing a brown stain and a respirator mask,[6] Orr testified that the cooler, which he found in Lawrence's bedroom, could not have been tested for fingerprints because the brown stain was probably iodine. He would not have attempted to obtain fingerprints from the mask because it could have toxins or residue on it from the manufacturing of methamphetamine. Photograph D[7] showed a torch, which was a homemade ignitor found beside a microwave oven. This ignitor was the one he physically collected and was tested for fingerprints at Lawrence's request in November 2005. Photograph E[8] depicted acetone, a methamphetamine precursor, the container of which probably could have been tested for fingerprints. Orr stated that photograph F[9] depicted clear glass jars. Because a chemical reaction occurred inside the jars, he considered them to be hazardous and would not have conducted a fingerprint analysis on them.

Orr testified that photograph G[10] depicted a Tupperware container of rock salt. Orr believed

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[4]At the time it ruled on the motion, the trial court divided the photographs into two categories, and the parties renumbered them. Photograph A is photograph 10 in Collective Exhibit 3 in the record.

[5]Photograph B is photograph 13 in Collective Exhibit 3.

[6]Photograph C is photograph 36 in Collective Exhibit 3.

[7]Photograph D is photograph 37 in Collective Exhibit 3.

[8]Photograph E is photograph 6 in Collective Exhibit 3.

[9]Photograph F is photograph 4 in Collective Exhibit 3.

[10]Photograph G is photograph 3 in Collective Exhibit 3.

that this container was not removed for disposal but was simply left at the property. Although rock salt can be a methamphetamine precursor, it would not have been used as such in the present case because the method of methamphetamine production used here relied upon anhydrous ammonia. Also, the container of rock salt was found in the kitchen, whereas all the other evidence was found in the bedrooms of the house and in the shed.

Orr testified that photographs H[11] and I[12] depicted a bottle of rubbing alcohol, which is a methamphetamine precursor, on a counter. The bottle of rubbing alcohol probably could have been tested for fingerprints. Photograph J[13] showed iodine crystals, upon which he would not have conducted fingerprint testing. He would not have tested any of the jars from which he collected a sample of liquid because they were hazardous. Photograph K[14] depicted a blue bag containing cans of starter fluid. The ether in starter fluid is a methamphetamine precursor. These cans were discovered at the "actual lab site" in the shed. A fingerprint analysis of the cans would not have been worthwhile because there were rubber gloves in the shed. Orr identified photograph L[15] as being a box containing cans of brake cleaner found at the laboratory site. The ether in brake cleaner is also a methamphetamine precursor. Orr stated "anything that was in the lab site was handled with gloves and taken out and destroyed." He had investigated methamphetamine laboratories since 2000, and he had never performed fingerprint testing in any of them.

Orr testified that photograph M[16] depicted tanks of anhydrous ammonia. Anhydrous ammonia tanks are cold and would not hold a fingerprint. Photograph N[17] showed a second propane torch that the officers found in a back room of the house. When asked why the propane torch was not tested for fingerprints, Orr replied, "We just didn't[,]"and repeated that fingerprint analysis was not a normal practice in investigating methamphetamine laboratories. Orr gathered no new evidence on Lawrence after October 2003, other than what was shown in the photographs and on the search inventory.

On cross-examination, Officer Orr testified that in February 2000, the DEA certified him to identify and safely dismantle methamphetamine laboratories. The Blount County Sheriff's Department, along with law enforcement agencies across the United States, follows the DEA's policies and procedures on destruction of hazardous wastes from methamphetamine laboratories. The DEA procedure is to remove and destroy all hazardous waste from a methamphetamine laboratory

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[11]Photograph H is photograph 9 in Collective Exhibit 3.

[12]Photograph I is photograph 8 in Collective Exhibit 3.

[13]Photograph J is photograph 35 in Collective Exhibit 3.

[14]Photograph K is photograph 27 in Collective Exhibit 3.

[15]Photograph L is photograph 26 in Collective Exhibit 3.

[16]Photograph M is photograph 23 in Collective Exhibit 3.

[17]Photograph N is photograph 1 in Collective Exhibit 3.

because this waste would create health problems for anyone coming into contact with it if it were stored at the police department. Moreover, methamphetamine laboratories release residue and pollutants into the air from the chemicals, odors, and moisture involved in methamphetamine production. The presence of residue and pollutants does not create a good environment for fingerprints to be left on objects.

On cross-examination, Orr testified that on October 4, 2003, he followed DEA procedures with regard to investigating and destroying the methamphetamine laboratory at 319 Old Cades Cove Road. Based upon his investigation and a co-defendant's statements, Orr knew that a methamphetamine cook had occurred in the shed. Orr was also told that some cooking had been done inside the house. If items such as brake fluid or acetone were in proximity to the methamphetamine cook or chemical breakdown, then these containers could have been contaminated. This is the reason that he did not store the items in the photographs or test them for fingerprints. Instead, Ferguson-Harber, a private hazardous waste contractor, removed the items for destruction. This was in compliance with standard DEA procedure.

On redirect examination, Orr testified that if a methamphetamine cook occurred in an enclosed room that was not properly vented, the entire room would be contaminated. He told the owner of the house in the present case to have an environmental group conduct a site survey and analysis to determine when she could return to the property. He agreed that he could have taken a fingerprint analyst to the scene before possession was returned to the homeowner but again stated that fingerprints were not collected in these types of cases. On recross-examination, Orr stated that his investigation revealed that Lawrence was at the house with permission. Thus, unlike in a burglary case, Lawrence could have touched anything in the house and his fingerprints on an item would have no investigative value.

Verlin Thomas Andrew "Andy" Long, a criminal defense attorney, testified as an expert for Lawrence. After reviewing Lawrence's records from the Blount County Jail and the evidence provided by the State, Long opined that Lawrence had been unlawfully detained from October 4 to October 18, 2003, because he was not taken before a magistrate without unnecessary delay. He believed that Lawrence was prejudiced by his lack of a lawyer during this time because a lawyer could have moved to have the evidence in the present case preserved. Long noted that evidence in methamphetamine cases is destroyed very quickly. Once the evidence was preserved, Lawrence and his lawyer could have discussed whether he wanted the evidence tested for fingerprints. The fact that a client's fingerprints are not found on evidence would be "very good exculpatory evidence." If the evidence was already destroyed, then the lawyer could have argued that Lawrence's defense was damaged by the destruction of evidence that he had requested be preserved.

On cross-examination, Long testified that if a client told him that the client had not touched items of evidence, then he would try to have the evidence preserved, especially in cases involving numerous defendants. He agreed that in the present case, Lawrence could have touched items in the house while he was lawfully on the premises. Given that the evidence here was unavailable by the afternoon of October 4, 2003, all Lawrence's attorney could have done was ask the police to conduct

a fingerprint analysis on those items not destroyed. Long had not dealt with methamphetamine cases in his own practice but was aware from seminars he had attended that the evidence in such cases was destroyed.

Defendant Lonnie Lawrence testified that if he had been offered an attorney during his detention, he would have asked the attorney to have the evidence shown in the photographs tested for fingerprints. Once he got a lawyer, he requested a fingerprint analysis on whatever evidence remained. On cross-examination, Lawrence admitted that once he was taken before a magistrate on his Missouri warrant, he waived extradition in that case and did not ask for a lawyer in the present methamphetamine case at that hearing.

In a hearing on December 22, 2005, the trial court ruled on Lawrence's Motion to Exclude Photographs. Regarding Lawrence's argument that he was unlawfully detained, the trial court found that even if he had been appointed a lawyer within forty-eight hours of his arrest, the evidence in the present case was already destroyed at that time. With regard to the destruction of evidence pictured in the photographs, the trial court determined that the officers' destruction of the evidence was intentional pursuant to a policy that anything in the vicinity of a methamphetamine laboratory during a cook is hazardous and cannot be maintained or processed for public safety reasons. The trial court determined that despite some proof of methamphetamine cooks occurring in the house, Officer Orr retained guns and other physical evidence from the house and did not wear gloves or a face mask while touching objects inside the house. Accordingly, the trial court concluded that the photographs of evidence in the shed were admissible. The trial court held that the photographs of evidence inside the house that looked tainted and was dangerous would be admissible. It concluded that the evidence inside the house that did not appear to be tainted or dangerous should have been preserved and that photographs of this evidence were inadmissible. The trial court then divided the photographs into two groups based upon this ruling. The photographs were numbered one through thirty-seven, and one through eighteen were suppressed.[18]

II. Analysis

The State argues that the trial court erroneously suppressed eighteen photographs of evidence discovered in the house at 319 Old Cades Cove Road. It contends that the investigating officers had no duty to preserve this evidence because it did not possess apparent exculpatory value and comparable evidence is available to the defendants. Alternatively, the State asserts that if this court determines that it did have a duty to preserve the evidence pictured in the photographs, a trial without the evidence would not be fundamentally unfair. Both defendants maintain that the trial court properly suppressed the photographs because a trial without the underlying physical evidence would

[18] In the initial order memorializing the December 22, 2005 ruling, the trial court ordered that photographs one through thirteen were inadmissible and that photographs nineteen through thirty-seven were admissible. The trial court issued a corrected order on December 30, 2005, stating that photographs one through eighteen were inadmissible.

violate their right to due process of law.

We begin by noting that the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 8 of the Tennessee Constitution afford every criminal defendant the right to a fair trial. See Johnson v. State, 38 S.W.3d 52, 55 (Tenn. 2001). Accordingly, the State has a constitutional duty to furnish a defendant with exculpatory evidence pertaining to the defendant's guilt or innocence or to the potential punishment faced by a defendant. See Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97 (1963).

In State v. Ferguson, 2 S.W.3d 912, 914 (Tenn. 1999), our supreme court addressed the issue of when a defendant is entitled to relief when the State has lost or destroyed evidence that was alleged to have been exculpatory. The court explained that a reviewing court must first determine whether the State had a duty to preserve the lost or destroyed evidence. Id. at 917. Ordinarily, "the State has a duty to preserve all evidence subject to discovery and inspection under Tenn. R. Crim. P. 16, or other applicable law." Id. However,

> "[w]hatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means."

Ferguson, 2 S.W.3d at 917 (quoting California v. Trombetta, 467 U.S. 479, 488-89, 104 S. Ct. 2528, 2534 (1984) (footnote and citation omitted)).

Ferguson also directs that if the proof demonstrates the existence of a duty to preserve the evidence and further shows that the State has failed in that duty, a court must proceed with a balancing analysis involving consideration of the following factors:

1. The degree of negligence involved;

2. The significance of the destroyed evidence, considered in light of the probative value and reliability of secondary or substitute evidence that remains available; and

3. The sufficiency of the other evidence used at trial to support the conviction.

Id. (footnote omitted). If the court's consideration of these factors reveals that a trial without the missing evidence would lack fundamental fairness, the court may consider several options such as dismissing the charges or providing an appropriate jury instruction. Id.

Generally, a trial court's decision to admit or exclude evidence at trial will not be overturned absent an abuse of discretion. State v. James, 81 S.W.3d 751, 760 (Tenn. 2002); see also State v.

William C. Tomlin, Jr., No. M2003-01746-CCA-R3-CD, 2004 WL 626704, at *3 (Tenn. Crim. App. at Nashville, Mar. 30, 2004). An abuse of discretion exists when the "'court applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining .'" State v. Shirley, 6 S.W.3d 243, 247 (Tenn. 1999) (quoting State v. Shuck, 953 S.W.2d 662, 669 (Tenn. 1997)).

In the present case, the trial court found that the State had a duty to preserve the evidence that was located inside the house and that did not appear to be tainted or dangerous. In this regard, the trial court determined that eighteen photographs depicted evidence that fell within this finding.[19] Although the photographs had originally been identified by a letter designation during Officer Orr's testimony, the parties assigned the photographs a number once the trial court categorized them as admissible or inadmissible. The following chart lists the suppressed photographs, giving their number within Collective Exhibit 3, their original letter, and a brief description of what is depicted based upon Officer Orr's testimony when possible:

No.	Letter	Description
1	N	Propane torch found in back room of house,
2	not lettered	Bare hand holding plastic baggy in front of open refrigerator door,
3	G	Gloved hand touching Tupperware container of rock salt found in the kitchen,
4	F	Clear glass jars on floor and boxes containing small, clear plastic baggies,
5	not lettered	Ladies shoes, stack of folded laundry beside duffle bag, papers, eyeglasses, eyeglass case, and clear glass jars containing liquids,
6	E	Acetone in a metal container in cabinet,
7	not lettered	Plastic tote containing men's clothing and small tube,

[19] We note that the trial court initially stated that the parties might want to present additional proof on the category into which the photographs should be classified. After dividing the photographs into two stacks, the judge stated that one category seemed suspect and that he would need to hear more proof relating to the hazards involved in handling the evidence they depicted to find them admissible. The judge also noted that the State might decide not to use the photographs in that stack and invited the parties to look through them. The trial court then summarized its ruling, and the parties stated that they understood it. The record does not reflect that any additional proof was offered on the hazardous nature of the evidence in the photographs.

8	I	Container of rubbing alcohol on counter and gloved hands holding an opened red plastic case in front of an opened drawer,
9	H	Container of rubbing alcohol on counter and gloved hands holding an opened white plastic case in front of an opened drawer,
10	A	Metal containers of denatured alcohol on a shelf and an ungloved hand holding a small plastic baggy,
11	not lettered	Unzipped red vinyl case,
12	not lettered	Unsealed glass jar containing a clear liquid on top of a cooler,
13	B	Orr with bare face and hands holding a respirator mask from the closet in Lawrence's bedroom,
14	not lettered	Microwave oven, homemade brass ignitor, milk jug, margarine container, and several bottles and cans on counter,
15	not lettered	Laundry or linens on floor, pillow, and laundry basket containing women's underclothing and shoes,
16	not lettered	Gloved hand holding opened a cabinet containing laundry detergent and clear glass jars of liquids,
17	not lettered	Rifle and handgun lying on armchair, and
18	not lettered	Opened drawer under microwave containing matchbooks, cellular telephone, walkie talkie, and other items.

We emphasize that this appeal and the subsequent Ferguson analysis extend only to the destruction of the evidence in these eighteen photographs, i.e., evidence that the trial court determined was inside the house and was not apparently tainted or dangerous. We do not reach the question of whether the officers should have destroyed the evidence in the remaining photographs.

A. State's Duty to Preserve Evidence

1. Discoverable under Tenn. R. Crim. P. 16.

The State's duty to preserve evidence turns first upon whether the defendant would be entitled to receive the evidence in discovery. Ferguson, 2 S.W.3d at 917. Rule 16, Tenn. R. Crim. P., permits a defendant to inspect tangible objects within the State's possession that are material to the preparation of the defense, that the State intends to use in its case-in-chief, or that were taken from or belong to the defendant. Tenn. R. Crim. P. 16(a)(1)(F). In the present case, the physical evidence pictured in photographs one through eighteen falls within the purvey of Rule 16 because the State presumably intends to use the photographs at trial. However, as noted above, the State's duty to preserve evidence also turns upon the materiality of that evidence. Ferguson, 2 S.W.3d at 917 (quoting Trombetta, 467 U.S. at 488-89, 104 S. Ct. at 2534). In this regard, our supreme court has directed that evidence is constitutionally material if it both possessed apparent exculpatory value before destruction and is of a type that other comparable evidence is not reasonably available to the defendant. Id.

2. Apparent exculpatory value.

The State argues that the evidence in the suppressed photographs had no apparent exculpatory value. It maintains that the evidence was, instead, inculpatory in that it shows that methamphetamine production was occurring. It points out that nothing in the record reveals that the officers on the scene believed the evidence to be exculpatory. Finally, it contends that the defendants' assertions that fingerprint analysis of the evidence may have been exculpatory is only a tenuous possibility. Lawrence argues that the evidence in question was apparently exculpatory to the officers because he did not live at the house. Thus, the presence of that evidence inside the residence was his only link to the methamphetamine laboratory. Pickett asserts that the absence of his fingerprints on the destroyed items would provide doubt as to his involvement in manufacturing methamphetamine. He also contends that fingerprinting items in a suspected methamphetamine laboratory is standard police procedure.

This court has previously examined the issue of the State's duty to preserve evidence upon which the defendant could have performed scientific testing that the defendant claims may have yielded exculpatory results. On the one hand, the State is not required to investigate cases in any particular way: "Due process does not require the police to conduct a particular type of investigation. Rather, the reliability of the evidence gathered by the police is tested in the crucible of a trial at which the defendant receives due process." State v. Terry W. Smith, No. 01C01-9609-CC-00404, 1998 WL 918607, at *14 (Tenn. Crim. App. at Nashville, Dec. 31, 1998); see also State v. Donald Terry Moore, No. 01C01-9702-CR-00061, 1998 WL 209046, * 9 (Tenn. Crim. App. at Nashville, Apr. 9, 1998) (observing that the State is not required to perform scientific testing, such as DNA analysis, on evidence), aff'd, 6 S.W.3d 235 (Tenn. 1999). Moreover, "[i]t is not the duty of this Court to pass judgment regarding the investigative techniques used by law enforcement unless they violate specific statutory or constitutional mandates." State v. Robert Earl Johnson, No. M2000-01647-CCA-R3-CD, 2001 WL 1180524, at *17 (Tenn. Crim. App. at Nashville, Oct. 8, 2001). Accordingly, when the police have not conducted a fingerprint analysis, there is typically no duty to preserve what is essentially nonexistent evidence. See State v. Kenneth Clay Davis, No. E2006-01459-CCA-R3-CD, 2007 WL 1259206, *4 (Tenn. Crim. App. at Knoxville, Apr. 30, 2007), perm. to appeal denied, (Tenn. 2007) (holding with regard to the absence of a recording of the traffic stop that the "State cannot destroy evidence that does not exist"), State v. Randall S. Sparks, No. M2005-02436-CCA-R3-CD, 2006 WL

2242236, at *5 (Tenn. Crim. App. at Nashville, Aug. 4, 2006) (holding that State had no duty to preserve recordings of drug transactions because recordings did not exist); see also John Darryl Williams-Bey v. State, No. M2005-00709-CCA-R3-PC, 2006 WL 2242263, at *7 (Tenn. Crim. App. at Nashville, Aug. 4, 2006) (affirming post-conviction court's finding that counsel was not ineffective for failing to seek non-existent fingerprint evidence or curative jury instruction therefore).

On the other hand, when the State itself seeks to use a piece of physical evidence or tests conducted thereon, a duty to preserve the evidence may arise. See State v. Gilbert, 751 S.W.2d 454, 460 (Tenn. Crim. App. 1988) (holding that when a defendant charged with DUI has given a blood sample for a blood-alcohol test, the defendant may rightfully request and receive a portion of that sample to submit for independent testing). In this situation, the defendant's request to inspect or test the same piece of evidence selected or tested by the State does not dictate to the police the type of investigation they must undertake. Instead, the police have already conducted the investigation and selected that evidence that they believed important. In State v. Sheri Lynn Cox, the trial court dismissed the presentment charging theft because the State lost the defendant's receipt books, which allegedly supported a shortage in funds and which had been examined by the State's accountant, thereby denying the defendant the opportunity to analyze or audit them herself. No. E2005-00240-CCA-R3-CD, 2005 WL 3369257, *2 (Tenn. Crim. App. at Knoxville, Dec. 12, 2005). Despite acknowledging that a defense audit could have been either exculpatory or inculpatory, this court held that the State had a duty to preserve the receipt books because they were "material to the preparation of the [defendant's] defense." Id. at *3. Similarly, when an investigating officer makes a recording of the defendant's statement, the officer has a duty to preserve the recording even though the officer was not constitutionally required to make the recording initially. See Sparks, No. M2005-02436-CCA-R3-CD, 2006 WL 2242236, at *5; see also State v. Nathaniel Robinson, Jr., No. E2004-02191-CCA-R3-CD, 2005 WL 2276421, at *4 (Tenn. Crim. App. at Knoxville, Sept. 19, 2005) (holding that "the police had a duty to preserve the videotape [of the defendant in the booking area], even though they had no duty to make the tape in the first place").

In the present case, the officers investigated the suspected methamphetamine laboratory at 319 Old Cades Cove Road and photographed that evidence which they believed revealed methamphetamine production. The trial court found that photographs one through eighteen depicted evidence inside the house that was neither tainted by methamphetamine production nor dangerous to preserve. Although we agree that the items may or may not have borne fingerprint evidence, the defendants' ability to test this untainted evidence for fingerprints is, at least, material to the preparation of their defense. See Ferguson, 2 S.W.3d at 918 (holding that the destroyed videotape was material to the defendant's preparation of his defense despite the "tenuous" nature of its exculpatory value). Accordingly, this prong of the analysis supports a duty on behalf of the State to preserve the evidence depicted in photographs one through eighteen that was not tainted or dangerous to collect and preserve.

In so holding, we re-emphasize that this analysis is limited to the evidence inside the house that was not dangerous or tainted by a methamphetamine cook. The duty to preserve evidence does not extend to that which the State cannot preserve. See Gilbert, 751 S.W.2d at 460 (holding that the defendant's right to a portion of his blood sample "presupposes that a sample or specimen is in

existence at the time of the request; and the sample or specimen is of sufficient size or quantity that it can be made available to the accused or his expert"); see also Moore, No. 01C01-9702-CR-00061, 1998 WL 209046, at *9-10 (holding that the State did not violate the defendant's due process rights by testing a semen sample with a method that totally consumed the sample). Although this precept was formulated in cases in which the evidence was consumed during testing, we conclude that it also must necessarily apply to evidence that is too dangerous to retain. In this regard, we note that photographs 4, 5, 12,14, and 16 show clear glass jars filled with unknown liquids. Officer Orr testified that he would not have conducted fingerprint analyses on any of the clear glass jars because they were hazardous. According to Orr, these jars had been subjected to chemical reactions. Thus, the only evidence in the record is that the clear glass jars containing unknown liquids were tainted or dangerous. The State had no duty to preserve these contaminated jars and, therefore, the trial court abused its discretion in suppressing photographs 4, 5, 12, 14, and 16.

Despite its error in suppressing the photographs depicting the glass jars, we believe that the trial court did not determine whether the items in the photographs were hazardous solely upon viewing the pictures, as the State contends. Instead, the trial court relied heavily upon Officer Orr's testimony and expertise in making its ruling: "[U]nder the extent of the expert proof that I have before me, which simply comes through, I think, 'just plain Officer Orr' and his training in the area of meth labs is that all that stuff needs to be taken care of [b]y professionals and, for public safety reasons, can't be maintained, can't be fingerprinted, can't be processed in any way." This comment reveals that the trial court considered Officer Orr's testimony along with the photographs themselves in reaching its ruling.

The State also maintains that the trial court disregarded DEA protocol and ignored the dangers surrounding methamphetamine production in determining that it had a duty to preserve the evidence depicted in the photographs. It cites to Illinois and Kansas cases in which the court deferred to police policy regarding the dismantling of methamphetamine laboratories. See People v. Gentry, 815 N.E.2d 27, 33 (Ill. App. 2004) (applying the Arizona v. Youngblood, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988), bad-faith test and holding that destruction of hazardous materials per a "routine, well-intentioned policy cannot be bad faith"); United States v. Bruce Evans & Karen Evans, No. 00-40082-01-RDR and 00-40082-02-RDR, 2001 WL 584331, at *2 (D. Kan. Apr. 9, 2001) (holding that officers making "a conscientious effort to follow their agency procedures and the court's order" regarding the destruction of "[t]oxic and dangerous materials, as well as contaminated property" did not act in bad faith). First, we observe that both of the examples cited by the State follow the bad faith test that our supreme court rejected in Ferguson. See Ferguson, 2 S.W.2d at 916-17. In fact, under the Ferguson analysis, the culpability of the State actors in destroying the evidence comes into play in determining the consequences for the breach of duty, rather than whether a duty exists in the first place. Id. at 917. Alternatively, the existence of a duty to preserve focuses on the materiality of the destroyed evidence to the defendant. Id. As such, to say that other jurisdictions, which follow a different test to determine whether a defendant has received due process, find compliance with police procedures to be controlling is simply inapposite. More importantly, the present case does not deal with whether an officer may properly destroy toxic or contaminated evidence pursuant to police policy but rather with whether an officer's destruction of uncontaminated evidence along with the toxic and contaminated evidence violates fundamental fairness. Here, Officer Orr testified that he could have conducted fingerprint

testing on many of the items depicted in the suppressed photographs. Some of the pictures themselves show him touching the items with his bare hands while unprotected by a gas mask. The trial court did not abuse its discretion in determining that the items depicted in photographs 1-3, 6-11, 13, 15, and 17-18 were not dangerous or tainted.

The State also argues that the trial court erroneously placed upon it the burden of showing that the evidence depicted in the suppressed photographs was apparently exculpatory and then assumed that the evidence had exculpatory value. To the contrary, at the December 22, 2005 hearing, Lawrence's counsel argued that fingerprint analysis of the destroyed evidence would be exculpatory because it would show that he had not touched the items that were deemed methamphetamine precursors and that his only link to the property was his presence in the house when the police arrived. The State countered by arguing that the absence of Lawrence's fingerprints on the items would not have exonerated him because the environment of a methamphetamine laboratory is not conducive for fingerprints to be left on items located in close proximity to the production of methamphetamine. During the arguments, the trial court questioned the State about which items had been tested for fingerprints in the case. At the conclusion of the arguments, the trial court found that the arguments on the destruction of evidence were the most relevant to its decision. The trial court then made findings that the photographs of items that were in proximity to the methamphetamine cook in the shed and those items in the house that were tainted or dangerous were admissible at trial. It also found that items that did not fall within these two categories should have been preserved. In other words, the trial court heard the arguments regarding the exculpatory nature of fingerprint analysis and questioned the parties on fingerprinting in this case before finding that the State had a duty to preserve the evidence. We agree that the trial court did not make an express finding that the evidence was apparently exculpatory. Nevertheless, the record of the hearing taken as a whole reveals that the trial court properly analyzed the issue and did not improperly assume that fingerprint testing of the items in photographs one through eighteen would have been exculpatory.

Defendant Pickett argues that DEA policy required the officers to test the items in the photographs for fingerprints. First, we note that the only proof in the record that speaks to DEA policy on fingerprinting items in a suspected methamphetamine laboratory is Officer Orr's testimony that he never conducted a fingerprint analysis in these types of cases. Other law enforcement agencies in Tennessee purportedly following DEA policy and procedures for investigating methamphetamine production have not conducted fingerprint analyses. See State v. Blair, 145 S.W.3d 633, 637 (Tenn. Crim. App. 2004) (recounting testimony of a DEA agent, an expert in methamphetamine production, who cautioned that "officers should not try to fingerprint items at a methamphetamine laboratory because chemicals could react or get on the officers' skin"); see also State v. Raymond Lee Gibson, No. E2006-00450-CCA-R3-CD, 2007 WL 1237796, at *2 (Tenn. Crim. App. at Knoxville, Apr. 27, 2007) (observing that an officer assigned to dismantle methamphetamine laboratory testified that items from a methamphetamine laboratory could not be submitted for fingerprints because they were "contaminated [and a] biohazard"). In support of his assertion, Pickett relies upon a Kansas case in which a DEA agent testified that the standard procedure in investigating the manufacturing of methamphetamine included dusting "likely items" for fingerprints before destroying the chemicals and hazardous items. State v. LaMae, 998 P.2d 106, 111 (Kan. 2000) (concluding that the investigating officer did not follow

DEA guidelines precisely because he did not confer with a chemist or the disposal service regarding which items should be destroyed). As discussed above, Kansas applies a bad faith analysis to determine whether the State's destruction of evidence violates due process. Id. at 110. In LaMae, the court examined whether the officers properly followed DEA procedure to determine whether they had acted in bad faith. Id. at 111. Our supreme court has rejected the bad faith standard in favor of the balancing test that it set forth in Ferguson. 2 S.W.2d at 917. Accordingly, we find that the specific facts underlying the LaMae case do not inform the result in our present analysis. Nevertheless, as set forth above, we hold that the items depicted in photographs one through eighteen were material to the defendants' defense.

3. Availability of comparable evidence.

The final prong in the analysis of the State's duty to preserve evidence looks to whether other comparable evidence is available to the defendants. The State argues that the photographs themselves are comparable evidence and that the defendants had access to eleven pieces of physical evidence that the police preserved in this case. It points out that three of the eleven items–a plastic baggy, a handgun, and a homemade brass ignitor–were tested for fingerprints at Lawrence's request and that no latent prints were found on these items. Pickett argues that the photographs of physical evidence are not comparable to the actual items themselves when the value of the items lies in the ability to test them for fingerprints.

In reviewing a conviction for possession of marijuana, the Texas Court of Appeals held that photographs are not comparable evidence when the defendant sought to conduct tests on the destroyed evidence. Pena v. State, 226 S.W.3d 634, 654 (Tex. App. 2007). In that case, the court concluded that photographs of the alleged marijuana were not comparable evidence to the marijuana itself, which had been destroyed by law enforcement, when the defendant wanted to have the plant material independently weighed. Id. (holding that "[p]hotographs and officer testimony are far less probative on this element of the State's case[,]" that is the quantity of marijuana). Likewise, the photographs of the physical evidence do not constitute comparable evidence under the circumstances of the present case. In the wake of the destruction of the underlying physical evidence, the defendants are simply precluded from defending themselves by showing that they did not touch the methamphetamine precursors found inside the residence. With regard to the eleven pieces of physical evidence that could be tested for fingerprints, we note that only a rifle appears to have been collected from the bedroom in which Lawrence was staying. This item was not submitted for fingerprint analysis. Moreover, none of the items that Officer Orr described as methamphetamine precursors found inside the house were preserved. Accordingly, we do not believe that either the photographs or the eleven pieces of physical evidence that were preserved in this case are comparable to the evidence that was destroyed with respect to the defendants' desire to conduct fingerprint analysis.

In sum, we conclude that the trial court did not abuse its discretion in finding that the investigating officers had a duty to preserve the physical evidence depicted in photographs 1-3, 6-11, 13, 15, and 17-18. The defendants were entitled to inspect these items in discovery. The evidence was material to the preparation of the defendants' defense. Finally, the photographs and the physical

evidence that were retained are not comparable evidence for the defendants' purposes. When Officer Orr turned over the items from inside the house that were untainted and not dangerous to the hazardous waste disposal company for destruction, he breached the State's duty to preserve this evidence. We turn next to the question of whether the trial court abused its discretion in suppressing the photographs as a remedy for the State's breach of its duty to preserve the evidence.

B. Consequences for Breach of Duty to Preserve

The State contends that the trial court failed to consider the balancing test set forth in Ferguson. It also asserts that proper weighing of the Ferguson factors reveals that suppression of the photographs is unwarranted in this case. The record reveals that the trial court's decision was informed by the Ferguson analysis. As noted above, the trial court found that the legal theory most relevant to its determination was the law relating to the destruction of evidence. Accordingly, we examine the three factors from Ferguson to assess whether the trial court abused its discretion in suppressing the photographs.

1. Negligence of State

The first factor in the balancing test set forth in Ferguson is "[t]he degree of negligence involved" in the loss or destruction of the evidence. 2 S.W.3d at 917. Here, the trial court found that the destruction of the evidence depicted in the suppressed photographs was intentional pursuant to a police policy for dismantling methamphetamine laboratories. Despite the fact that Officer Orr acted intentionally rather than negligently, the record reveals that he did not destroy the evidence maliciously or with an intent to disadvantage the defendants. In State v. Nathaniel Robinson, Jr., this court examined the destruction of a surveillance videotape of the police department's booking area pursuant to the department's policy that the tape be erased several days later unless a defendant depicted on the tape refused to consent to a blood alcohol test. No. E2004-02191-CCA-R3-CD, 2005 WL 2276421, at *4. We held that although the videotape was erased intentionally pursuant to police policy, the act still constituted "'simple negligence, as distinguished from gross negligence'" for purposes of the Ferguson analysis because there was no intent to destroy evidence. Id. at *5 (quoting Ferguson, 2 S.W.2d at 917). Instead, the "negligence [was] manifest in the police department's failure to foresee that [its] voluntary taping procedure could result in evidence that it had a duty to preserve." Id. Similarly, in the present case, Officer Orr was negligent in turning over the untainted and uncontaminated evidence along with the hazardous waste to Ferguson-Harber for destruction. We conclude that this negligence was simple rather than gross negligence.

2. Significance of destroyed evidence.

Second, we consider the significance of the missing evidence "in light of the probative value and reliability of secondary or substitute evidence that remains available." Ferguson, 2 S.W.3d at 917. The State argues that even if the results of fingerprint analysis on the destroyed evidence had revealed that the defendants' fingerprints were not on the items, these test results would not have exonerated the defendants. In this respect, it contends that the presence of rubber gloves at the property as well as the

fact that fumes from methamphetamine production prevent the leaving of fingerprints minimize the value of such fingerprint testing. It also asserts that the photographs of the destroyed evidence provide reliable substitutes for the evidence itself. Lawrence maintains that because he was a guest at the residence, his fingerprints on the destroyed items would have been the only physical evidence linking him to methamphetamine production there. Thus, he asserts that fingerprint analysis of the destroyed evidence was crucial to his defense. Pickett argues that the absence of his fingerprints on the destroyed items would serve to provide reasonable doubt as to his involvement in the methamphetamine production. Both defendants note that the presence of rubber gloves at the property does not eliminate the potential for fingerprints to be found on the destroyed items because it is unlikely that gloves would have been worn at all times, especially at the time the items were purchased.

As discussed above, the photographs of the alleged methamphetamine precursors are not comparable evidence when the value of the evidence lies in the defendants' ability to conduct fingerprint tests on it. See Pena, 226 S.W.3d at 654. Although Officer Orr testified that gloves were found at the residence and that the fumes produced during methamphetamine cooks created a bad environment for fingerprints to be left on items in proximity to the cook, he also testified that many of the items from inside the house that were destroyed could have been tested for fingerprints. Moreover, we note that the brass ignitor which is pictured beside a microwave and near a number of the destroyed items was collected and subsequently analyzed for fingerprints at Lawrence's request. Lawrence's presence as a guest at the house rented by the other two defendants and Pickett's absence from the house for some five days prior to the investigation of the methamphetamine laboratory, according to Starlit Johnson, increase the significance of fingerprint analysis of the destroyed items in this case. Although the absence of the defendants' fingerprints on the destroyed items would not have exonerated the defendants, we conclude that such evidence would have been at least moderately significant in the present case. Accordingly, the significance of the evidence weighs in the defendants' favor.

3. Sufficiency of other evidence to convict.

The third factor for this court to weigh is the sufficiency of the other available evidence to support a conviction. This factor is difficult to evaluate at this stage in the proceedings because all of the evidence has yet to be been presented. Although we have the testimony of Defendant Johnson from the September 9, 2005 hearing, the record contains no account from James Maynard. Maynard was arrested at the residence along with Lawrence at the time the officers investigated the suspected methamphetamine laboratory; and according to Officer Neese's testimony, he subsequently entered into a plea agreement with the State. Although Lawrence contends that destroyed methamphetamine precursors were the only link between him and any methamphetamine production on the property, we note that Johnson testified that he stayed at the house frequently and that he had a key to the padlock that Pickett had installed on the shed. We also note that photographs of the alleged methamphetamine precursors that the trial court found were tainted or dangerous, such as the cooler with the brown stain and the mask found in the bedroom where Lawrence was staying, have not been suppressed. Nevertheless, the state of the evidence is such that we cannot at this juncture evaluate its sufficiency to support convictions for Lawrence and Pickett for manufacturing methamphetamine.

In weighing these factors, we hold that the balance tips in favor of the defendants, especially considering the significance of the ability to test the destroyed items for fingerprints to their defenses. Accordingly, we conclude that the trial court did not abuse its discretion in suppressing photographs 1-3, 6-11, 13, 15, and 17-18. The State argues that if any remedy was necessary, a curative jury instruction would have been more appropriate than suppression of the photographs. In this respect, our supreme court in Ferguson placed the selection of an appropriate remedy within the sound discretion of the trial judge: "The trial judge may craft such orders as may be appropriate to protect the defendant's fair trial rights." 2 S.W.3d at 917. We adduce no abuse of that discretion in the trial court's determination that suppression of the photographs was the appropriate remedy in this case.

III. Conclusion

Based upon the record and the parties' briefs, we conclude that the trial court's order suppressing photographs 1 through 18 should be affirmed with regard to photographs 1-3, 6-11, 13, 15, and 17-18 and reversed with regard to photographs 4, 5, 12, 14, and 16. The case is remanded for further proceedings consistent with this opinion.

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NORMA McGEE OGLE, JUDGE